OMAHA WITHOUT A POLICE COMMISSION

Judge Scott Holds the Charter Provision to Be Unconstitutional.

GOVERNOR HAS NO RIGHT TO APPOINT THE MEMBERS

Court Holds That the Board Which Has Been Acting Has No Legal Existance and That the Plain Duty of the City Council is to Provide Forthwith for the Government of the Fire and Police Departments-Full Text of the Opinion.

Judge Scott decided yesterday morning that the law providing for the appointment of A fire and police commission for cities of the metropolitan class is unconstitutional and void, and that therefore the mon who are holding under Governor Holcomb are acting without authority of law. The opinion was handed down in the presence of a large number of city officials and citizens.

The suit which brought about the dec'sion rendered by Judge Scott was a mandamus brought by Frank McCoy and Robert Olmstead in behalf of the people. Application for the writ was made some days ago, and was argued at the time and was taken under advisement by the court. In their arguments the applicants contended that the law passed by the legislature delegating to the governor authority to name officers for the city of Omaha was at variance with the constitution of the state and was a usurpation of the principles of the rights of self-government. In passing upon the case, Judge Scott sustained this position and went even forther, as the following opinion will show.

The court holds that if the legislature could cass a law delegating to the governor the power to appoint members of the fire and police commission it could also delegate authority to the state executive to name the mayor and other municipal officers.

In denying the writ of mandamus Judge Scott goes upon the theory that the city is without any legally appointed fire and police commission and that consequently there is no reason why a writ should issue in the premises.

Judge Scott in his opinion holds that the mayor, acting in conjunction with the city council, has authority to provide for the government of the fire and police departments and that they will do so if they desire to uphold the laws as passed by the legislature of the state and approved by the governor, the present existing pretended law to the contrary notwithstanding.

Line of Reasoning Employed and

Authorities Depended On. The full text of Judge Scott's decision, with

his conclusions follows: "In the district court of Douglas county, Nebraska, State of Nebraska, ex. rel., Frank L. McCoy and Robert H. Olmsted, relators, against Frank D. Moores, mayor of the city of Omaha, et. al., respondents. Opinion of

"On the 4th day of January, A. D., 1898, the relators presented to this branch of the district court their duly verified application for a peremptory writ of mandamus against the respondents, commanding the respondent mayor to appoint four citizens of said city to the four vacancies existing in the offices of Fire and Police Commissioners of said city in accordance with the provisions of section 167 of chapter xiiA of the Compiled Statutes of 1897 of the State of Nebraska, and that the other respondents as members of said council shall, at a council meeting, act upon such appointments so to be made by said mayor, and that they make due return to this court of their compliance with said perempt-ory writ of mandamus. The grounds upon which the writ is prayed against respondents

among other things are:

"I. That the city of Omaha is a city within said county of Douglas, having more than \$8,000 Inhabitants, organized and existing under and by virtue of chapter 12A of the Compiled Statutes of Nebraska for the

That the relators, Frank L. McCoy and Robert H. Oimstea are cach that the said city of Omaha and are taxpayers

therein.
"3. That the respondent, Frank E. Moores was, on the 20th day of April, 1897, duly elected as mayor of the said city of Omaha and, having duly qualified according to law, entered into the discharge of his du law, entered into the discharge of his duties as such mayor and has continued to act and is now acting as such mayor, and that the respondents, William W. Bingham, William F. Bechel, Louis Burmester, Charles O, Lobeck, Myron D, Karr, Ernest Stuht, David T, Mount, Frank J. Burkley and George W. Mercer, were, each of them, on said 20th day of April, 1897, duly elected as councilmen for said city of Omaha, and having qualified therefor, according to law, duly entered upon the discharge of their duties as such councilmen and have since then continued to act and are now acting as such councilmen.

as such councilmen, COMPOSITION OF BOARD.

"4. That there is a department of the said clity of Omaha known and existing under and by virtue of said chapter 12A of said Compiled Statutes of Nebraska of 1897, as the Board of Fire and Police Commissioners of said city, which said Board of Fire and Police Commissioners, as now constituted, is composed of the respondent, Frank E. Moores, and of four persons pretending to be and acting as the other members thereof, to-wit: D. D. Gregory, William C. Bullard, James H. Peabody and R. E. L. Herdman, That on or about the 19th day of March, 187, the Hon, Silas A. Holcomb, as governor of the state of Nebraska, assumed the power and pretended to appoint and commission the said D. D. Gregory, William C. Bullard, James H. Peabody and R. E. L. Herdman under the provisions of said chapter 12A to be members of said Fire and Police Board for the respective terms stated in section 187 of said chapter 12A, and thereupon the said D. D. COMPOSITION OF BOARD. respective terms stated in section 167 of said chapter 12A, and thereupon the said D, D. Gregory, William C, Bullard, James H, Peabody and R, E, L, Herdman, without any other appointment or authority, and claiming no other right than as appointees of said governor as aforesaid, acting together, entered into the possession of the offices and records of said Board of Fire and Police Commissioners, and assumed offices and records of said Board of Fire and Police Commissioners, and assumed the powers, duties and functions of de jure members of said board, and since about the 19th day of March 1897, the said D. D. Gregory, William C. Bullard, James H. Peabody and R. E. L. Herdman have been in exclusive possession of said offices of Fire and Police Commissioners of the city of Omaha, to which they were making claim, and continue today in possession of said offices without any other right, claim or authority and without any right in law thereto.

or authority and without any right in law thereto.

"5. That the relators, Frank I., McCoy and Robert H. Oimsted, after stating to the respondent, Frank E. Moores, as mayor of said city, and to a majority of the other respondents, as members of the city council of said city that under and by virtue of our constitution and other supreme laws, and of said chapter 12A, a vacancy exists in each of the four offices of Fire and Police Commissioners in said city of Omahanow occupied by said D. D. Gregory, William C. Bullard, James H. Peabody and R. E. L. Herdman, for the reason that under said laws the legislature had no power to authorize the governor to make such appointments or any appointments to said offices, and that the governor had and has no power whatsoever to lawfully fill said offices, but that under said iaws such power of appointment to said offices of power of appointment to said offices of Fire and Police Commissioners of the city of Omaha inheres, in accordance with the right or principle of local seif-sovernment, in the mayor of Omaha, subject to the confirmation of his appointees by the coun-cil of said city.

This mat'e was presented to op a court on the 4th day of January, A. D., 1898, by the relators, the respondents not appearing, and the case was taken under advisement by the

VITAL QUESTION. writ rests upon the ground that its issuance, as prayed, is demanded, as a means provided by law, to uphold and perpetuate local solf-of said officers shall take and subscribe an

TEXT OF THE COURT'S OPINION, government for the people of Omaha, and that a denial of the writ would jeopardize, if not in fact destroy, the right of local government to the citizens of Omaha. Hence it be-comes necessary to consider and pass upon all the questions involved the same as if the hearing was by quo warranto proceedings against the present so-called members of the Fire and Police Commission upon the grounds relied upon for the writ in this case; that is, the court before granting the peremptory writ should be satisfied that on a hearing in quo warranto proceedings against those persons the court would, upon the grounds al-leged by relators, oust the persons now claiming to be official members of the Fire and Police Commission. Not only so, but the act commanded by the writ to be done by respondents should be such an act as it is their legal duty to do, and for the neglect of which there is no other lawful means of redress.

"Section 645, chapter III, Compiled Statutes of Nebraska, 1897, provides that: "The writ of mendamus may be issued to any inferior tribunal, corporation, board or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or sta-

"Section 646 of the same statute provides "This writ may not be issued in any case where there is a plain and adequate and section 648 provides that 'When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not perform-ing it, a peremptory mandamus may be allowed in the first instance. In all other cases the alternative writ must first be

"Keeping these sections of the statute in mind, as also the fact that originally it was grafting it has received in its passage down the long line of common law and various state courts and statutory enactments we deduce the following essential pre-existing facts to the granting of the peremptory writ

The act, the performance of which i "I. The act, the performance of which is sought to be compelled by the writ, must be an act which the law specially enjoins as a duty resulting from the office, trust or station of the party mandamused.

"2. That the neglect of the party mandamused to perform the act which the law specially enjoins as a duty resulting from such office, trust or station, would leave the relators without any other way of redress.

RIGHT TO REMEDY.

"3. That the right to the remedy by per-emptory mandamus to compel the perform-ance of the act must be clear, and it must be apparent to the court that no valid ex-cuse can be given by the party man-damused for not performing it.

"The act sought to be enforced by this proceeding is the appointment by respondents of four Fire and Police Commissioners, but this is only seeking a means by which to accomplish an ultimate end-the ousting of present incumbents from those offices-hence the court will not grant the means sought for that purpose, unless such means when so obtained will, as a matter of right, and under the law, justly effectuate such purpose. Therefore, it follows that such purpose. Therefore, it follows that whatever lawful reasons might or could be urged by the present incumbents in the office of Fire and Police Commissioners, why they should not be removed therefrom, as well a all lawful reasons which might or could be urged why they should be removed there from, should be fully considered by the court in determining whether the peremptory writ of mandamus should go against respondents. "Section 166 of the act known as the Omaha charter, passed by the legislature in 1897, provides that: "In each city of the metroplitan class there shall be a board of Fire and Police Commissioners, to consist of the mayor, who shall be ex-officio chair-man of the board, and four electors of the who shall be appointed by the gov-

"Section 167 provides that: 'Immediately on the taking effect of this act the governor shall appoint for each city governed by this t four commissioners, not more than two whom shall be of the same political faith er party allegiance, one of whom shall be lesignated to serve until the first Monday of April, 1898, and one to serve until the first Monday of April, 1899, and one to serve until the first Monlay of April, 1990, and one to serve until the first Monday of April, 1991, and on the last Tuesday in March, in 1898, and on the same day in each year thereafter the governor shall appoint one commis-sioner in each city governed by this act, to take the place of the commissioner whose term of office expires on the first Monday in April following such appointment, except where appointments are made to fill vacancies, in which case those appointed shall serve the remainder of the term of the persons whose vacancies they are appointed fill. Whenever a vacancy shall occur in board of Fire and Police Commissioners. either by death, resignation, removal from the city, or any other cause, the governor shall appoint a commissioner to fill such

vacancy "The vital question, shall the peremptory idules connected with and incident to the apwrit of mandamus go sgainst respondents as pointment, removal, government and discipling prayed, is one of more than ordinary importance in that its tap root reaches into the very heart of local self-government for its very heart of local self-government for its sustenance and support. If this be not so, then the writ should be dealed, because, as the case is presented, relators' right to the writ rests upon the ground that its issuance.

of his ability to discharge his duties as a member of said board, and that in making appointments or considering promotion or removals he will not be guided or actuated by political motives or influences, but will consider only the interest of the city, and the success and effectiveness of said department. The Board of Fire and Police Commissioners shall have power, and it shall be the duty of eaid board, to appoint a chief of the fire de-partment and such other officers of the fire department as may be deemed necessary for is proper direction, management and regulation, all of whom shall be electors of such city, and under such rules and regulations as may be adopted by said board. Said board may remove such officers or any of them whenever said board shall consider and declare such removal necessary for the proper manage-ment or discipline or for the more effective working or service of said department. shall be the duty of policemen to make a daily report to the chief of police of the time of lighting and extinguishing of all public lights and lamps upon their beats and also any lamp that may be broken or out of repair. They shall also report to the same officer any defects in any sidewalk, street, alley or other public highway, or the existence of ice or dangerous obstructions on the walks or streets, or breek in any sewer, or disagree able odors emanating from inlets to sewers, or any violation of the health laws or ordisances of the city. Suitable blanks for making such reports shall be furnished to the chief of police by the city electrician and health commissioner. Such reports shall be by the chief of police transmitted to the city electrician or health commis-sioner as shall be proper, and in case of violation of law or ordinance the policemen making report shall report the facts to the city prosecutor. The Board of Fire and Police Commissioners shall employ such firemen and assistants, as may be proper and necessary for the effective service of this department, to the extent and limit that the funds provided by the mayor and council for that purpose shall allow. The Beard of Fire and Police Commissioners shall have the power and it shall be the duty of said board to appoint a chief of police, and such other officers and policemen, all of and such other officers and policemen, all of whom shall be electors of such city, to the extent that funds may be provided by the mayor and council to pay their salaries, and as may be necessary for the proper protection and efficient policing of the city, and as may be necessary to protect citizens and property and maintain posses and greaters. property, and maintain peace and good order. The board may appoint such number of police mattens not to exceed two, whose duties shall be defined by the police board. The chief of police and all other police officers, policemen and police matron, shall e subject to removal by the Board of Fire to 1 Police Commissioners, under such rules and regulations as may be adopted by said board, whenever said board shall consider and declare such removal necessary for the proper management or discipline, or for the nore effective working or service of the police department. No member or officer of the police or fire department shall be discharged for political reesons, nor shall a person be employed or taken into either of aid departments for political reasons. Be fore a member of the police or fire depart-ment can be discharged charges must be filed against him before the Board of Fire and Police Commissioners and a hearing had thereon, and an opportunity given such mem-ber to defend against such charges, but this provision shall not be construed to prevent peremptory suspension of such member by his superiors in case of misconduct or neglect of duty or disobedience of orders. Wheneve any such suspension is made, charges shall be at once filed before the Board of Fire and Police Commissioners by the person order-ing such suspension, and a trial had thereon at the second meeting of the board there-after. It shall be the duty of the said Board of Fire and Police Commissioners to adopt such rules and regulations for the guid-ance of the officers and men of said department, for the appointment, promotion, re-moval, trial or discipline of said officers, men and matron as said board shall conslder proper and necessary. The board shall have the power to enforce the attendance same manner and with like offeet

of witnesses and the production of books and papers, and to administer oaths to them in of magistrates exercising civil and criminal urisdiction under the statutes of the state f Nebruska. The board shall have such other powers and perform such other duties s may be authorized or defined by ordinance.' PROVISIONS OF THE STATUTE "Section 66 provides that each fire and police commissioner shall receive a salary of \$400 per annum; that the bonds of the coma prerogative writ which issued from the \$400 per annum; that the bonds of the com-court of queen's bench and the pruning and missioners of fire and colice shall be approved by the governor; that each policeman shall eccive not exceeding \$75 per month, and

not less than \$65; that each officer of po-lice and fice department or engineer of fire engine under the rank of chief or assistant hief shall receive not exceeding \$90 per nonth. The salaries are all paid out of the ity treasury, as provided by the charter. "Keeping these provisions of the city char er in view, as they are the bases of this tion, it will be seen that, as before stated, he ultimate object to be attained by these proceedings involves a question most vital and momentous, in that it involves the right of local self-government by the inhabitants

'If the right of local municipal government is an inverent right of the people, then it is as much of an inalienable right as is the right of the geople to life, liberty and the ursuit of happiness, and the state cannot take that inherent right of municipal selfgovernment from the people any more than it can take from them their inslienable right to life, liberty and the pursuit of hop-Nor could the people of the munici by any means sucrender that right o the legislature of the state, or bind themlves in that regard by a constitutional provision alienating such right, because what is inalienable cannot be allemated; to hold otherwise would be an inconsistency so glaring and nonstrous that it would not be tolerated. If the people of this state had declared in their constitution 'that all men are' not 'cre ated equal; 'that they are' not 'endowed by their Creator with certain malienable rights among which are life, liberty and the happiness,' would the people of state be estroped thereby from claiming their rights as American freemen, under the dec-aration of American Independence—the American's Magna Charta and Bill

CONSTITUTIONAL GUARANTEE. "The people of this state in 1875 adopted he orestot state constitution. Section 1, article i, thereof, provides that: 'All persons nature free and independent, have ere by nature free and the rights; among certain inherent, inclienable rights; among certain inherent, inclienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among the people, deriving their just powers from the consent of the gov-erned. This provision of the constitution did not create a new right in the people. Nor did the declaration of independence in that regard. These rights being inherent in the people are the endowments of Al-mighty God; the people are and have been, since the first man. Adam, was created endowed by their Creator with these rights, and hence they are inalienable; and hence they are greater than all constitutions; all legislatures; and hence any act of any legislature abridging or taking away these in-alienable rights is absolutely null and void, no matter what the constitutional provi-sions may or may not be. These rights need no constitutional recognition or declaration they enforce themselves, because they are the fundamental and unchangeable foundation of a republican form of government-an inheritance of a free people from the but it cannot repeal God's endowments upon man with these inalienable rights. It can-not repeal, the declaration of American in-

dependence.
"Is not a municipal government one of the 'governments instituted among the peo-ple to secure these rights?' Are they not essential to that end?

BASIS OF FREE GOVERNMENT.

oath, to be filed with the city clerk, faith-fully, impartially, honestly and to the best the republic, and that the fundamental idea of a free government like ours, and to perpetuate such government, is and always has been the right of the people to local mu-

> America, says: 'Local assemblies of citizens constitute the strength of free nations. Municipal institutions are to liberty what pri-mary schools are to science; they bring it within the people's reach; they teach men how to use and how enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty.'

> "Speaking of this noted author, Chancellor ent says: That DeToqueville, one of the Kent says: most philosophical and fair of foreign ob-servers, was much struck with the institutions of New England towns; and considered them as small independent republics in all matters of local concern and as forming the principle of the life of American liberty existing at this day."

or impliedly guaranteed in our state consti-tutions. The elective franchise in these local republics is not as was the case until recently in England a privilege dependent upon custom or usage, or confined to certain classes, but is uniform end universal, bodies politic, and investing the citizens thereof with the power of self-government, has, upon the whole, been most happy."

"In People against Albertson, 55 N. Y. at page 57, the court may: The right of self-government lies at the foundation of our institutions and cannot be disturbed or in-terfered with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the govern ment, but every intraction or invasion of it to be promptly met and condemned, especially by the courts, when such acts become the subject of judicial investigation.

SMALLEST DIVISION SACRED.

"Mr. Jefferson, in volume v, page 525, of his works, speaking of municipal govern-ment, says: These little republics would be the main strength of the great one. We owe to them the vigor given to our revolution in its commencement in the eastern states * * could I once see this I should consider it the dawn of the salva-tion of the republic.'

'Pomeroy, in his Constitutional Law, section 155, Bennett's edition, speaking of the contending forces for the supremacy in this country, says: "The whole civil polity is thus based upon two grand ideas as its foundation and supports; the idea of local self-government, and the idea of centralization. these contending forces.'
"Respecting local municipal self-govern-

ment in this country and the centralized gov-e; ment in France, Judge Dillon, in his work above referred to, section 10, says: France s a highly centralized government. The state there is everything, the people, nothing. Municipal institutions, with a democratic element, or with the power of independent local self-government, belong, then, to the past. The central power governs and

regulatee everything. This centralization of power in France, of which Judge Dillon speaks, brought on the communistic revolution which drove Napoleon III from the ESSENTIAL TO GOOD GOVERNMENT.

" 'How different,' says Dillon, supra, 'with the decentralized system of government in the United States, where each local constitiency chooses its own officers; each road porations with definite powers of local ad-porations with definite powers of local ad-ministration, and the extension of the right to vote for officers, to all who are to be affected by their action, are due that famillarity with public affairs and that love of liberty and regard for private rights and property, which are characteristic of the best government in Europe, Great Britain and the best in America, the United

States." "A municipal corporation is defined to be an investing the people of a place with the local government thereof.' This definition and description of a municipal corporation, says Justico Nelson, in People against Morris, 13 Wend., 325, 334: 'Is the most appropriate. and is justified by the history of these institutions and the nature of the powers with which they were and are invested.

Once more: Pomeroy, in speaking of the preed restoration to the people of local municipal self-government from the Eng-lish nobility, says, at section 164: 'As these local divisions, with their gatherings of the people, and their territorial preserved the seeds of liberty in England and finally triumphed over the crown in the progress of their development into a complete representative form of government so are the same and similar local communities among us necessary to the preserva-tion of liberty and the maintenance of that due balance which shall at once prevent anarchy and absolutism."

WOULD BE BOLD MOCKERY. "Judge Cooley, in People against Hulburt, 24 Mich., 44, said: 'It would be the boldert mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion "The foregoing principles are not only rec ognized, but emphasized by the supreme court of Indiana, volume 118, 382, in a most

ably considered case by Judge Coffey. "That eminent writer, Prof. Lieber, cays 'Self-government, general as well as local is indispensable to our liberties.' Thoma Thomas Jefferson, speaking of the local governments in New England, says: These wards, called townships in New England, are the votal principle of their government, and have proved themselves the wisest invention ever "There has been much said about the said of the provided in the said of the said devised by the wit of man for the perfect exercise of self-government, and for its pres-

ervation. As Cato then concluded every speech with the words, "Carthage delenda est," so do I every opinion, divide the county into wards. "Elliott, C. J., in State ex rel Jameson et al against Denny, mayor, volume 118, page 402. Michigan reports, commenting on these words of Jefferson, oald: These words of wisdom influenced our people and the framers of our organic law, and they should so influence our courts that they may not depart from the fundamental principle of self-government. The right of local self-government is, indeed, one of the strongest and most efficient checks in our system of checks and balances which John Adams and the other great statesmen of his time so

earnestly labored to perfet and establish.' Municipal corporations! means the right of a freeman—the right to vote.
"I have said that the Declaration of Amercan Independence, under which the inalien-ible right of the people to life, liberty and property is guaranteed, and under which the right to local municipal self-government is an inherent and therefore foundation of the world to the end of time.

A legislature may do a great many things.

Ognition: In fact, the animal constitutional recognition; in fact, that the people are in-hibited from making a constitution abridg-ing or abrogating the right of the citizens to such local municipal self-government; that if such a provision was in the constitu-

tion it would be absolutely void, and of no REQUIRED OF NEBRASKA. "Congress, on the 19th day of April, 1864, passed an act to enable the people of Ne-

'In Rathbone against Wirth, 6 Hun. (N Y.), the court says: 'In interpreting the powers of the legislature under the constitu-tion, courts are not confined to the strict letter of that instrument, nor are they com-pelled to point out the exact article, section, clause or phrase, which grants or de-nies the particular power; for there are some things so contrary to the entire pur-pose and spirit of the constitution that they must be said to conflict with it. And again. "Judge Dillon, at page 16, volume 1, third constitution, that which gives it valuable edition of his Municipal Corporations, cays: attraction, that which makes it valuable and draws to it the affections of the people, also supply an interpretation of its edition of his Municipal Corporations, cays:
The policy of creating local public and municipal corporations for the management of matters of local concern runs back to an entering of our colonial history, is expected on the people of the colonial history is expected on the people of the people the legislature cannot take from the people by the passage of a statute, the power of the majority to govern, and this because of the principle of local self-government which is recognized by the constitution, and generally, as a fundamental principle in Amertain classes, but is uniform end universal, can political institutions; that 'local affairs shall be decided and regulated by local authorities, cities, towns and districts of country into bodies politic, and investing the citizens of the state shall have the right to control their own civic affairs and select their own local officials, free from control by the general public or the state at large.' This case was affirmed by the New York court of appeals in an elaborate opinion by Gray, J., as also in an able and exhaustive opinion by C'Brien. I will me exhaustive opinion by O'Brien, J., volume cl. pige 149. This same fundamental docine was also, in a pronounced form, reiterated by the supreme court of Connectiut, volume lxv, page 478, in an opinion by Hamersley, J., who uses this significant language: 'No legislative act is valid that is clearly obnoxious to the principle of equality in rights guaranteed by the Bill of Rights.' And, 'the rights protected by the Bill of Rights are those that inhere in the great and essential principles of liberty and free government, recognized in the course of events that resulted in our independence, and established by the adoption of our con stitution; and that 'equality is a protecte right-equality under the law in the rights to life, liberty and the pursuit of happi-ness.'

STATE IS NOT SUPREME "The supreme court of Iowa, in State ex government, and the idea of centralization. The first was borrowed from the tribal customs of the Saxons and other Germanic tribes who invaded western Europe. The second is the heritage of Rome. The one is the safeguard of liberty; the other the source of power * * * The history of the world is the history of struggles between these contending forces.'

The first was borrowed from the tribal customs of the constitution confers upon the state as is the express grant of specific authority upon the state sacred and binding upon the state as is the express grant of specific authority upon the state sacred and binding upon the citizen; other sacred and binding upon the citizen; other sacred and binding upon the citizen; other sacred and binding upon the citizen. This right of the state is limited in that power, which limitations are as accent and binding upon the citizen. This right of the state is limited in that power, which limitations are as accent and binding upon the citizen. The power which limitations are as accent and binding upon the citizen. The power which limitations are as accent and binding upon the citizen. The power which limitations are as accent and binding upon the citizen. The power which limitations are as accent and binding upon the citizen. The power which limitations are as accent and binding upon the citizen. The power which limitations are as accent and binding upon the citizen. The power which limitations are as accent and binding upon the citizen. The power which limitations are as accent and binding upon the citizen. The power which limitations are as accent and binding upon the citizen. The power which limitations are as accent and binding upon the citizen. The power which limitations are as accent and binding upon the citizen. The power which limitations are as accent and binding upon the citizen. Many of them may not be enumerated in the constitution, nor preserved by express provisions thereof, notwithstanding they exist, and are possessed by the people, free from governmental interference. 'We say then,' says the court, 'that there is an implied limitation upon the power of the legis-lature to delegate the power of taxatlon.'

SETTLE TWO PROBLEMS. "These citations, somewhat extended by me because of the importance of the questions involved, and which could be extended almost without limit, would seem to put at rest in this country two pivotal legal problems pervading our complex system of gov-ernment, to-wit: That local municipal selfend courts should, to 'avoid the very ap-pearance of evil' in that regard, read the constitution between the lines when neces-sary, as determined in Rathbone against Wirth, and the Iowa cress supra, even though between lines which, read alone, would, ex vitermini, deny the right of the people to municipal self-government, for it must be remembered that 'an act violating the true intent and meaning ment,' (constitution), 'though within the let ter, is as much within the purview and effect of a constitutional prohibition as if within its strict letter.' Rathbone vs. Wirth, and Rathbone vs. Wirth, and other cases cited supra.

"When courts read the constitution in determining there inherent rights of the people to local self-government, and, in determining their political indeed, governmental rights. light should guide their investigations or anprove their conclusions, respecting those in-herent rights, than the all-perveding truths embodied in the great Bill of Rights-the Declaration of Independence.

Constitutions, when the inherent rights of the people are involved, should be read under and through that Bill of Rights. By the unwritten law of the land, that charter is to read between every word, syllable, line and sentence of the constitution, and any word, syllable, line or sentence thereof that is in conflict with the principles of that charter must give way to the charter, as if those words, syllables, lines or sentences were not in the constitution.

"All doubts, when construing the constitution respecting these inherent rights of the people, must be resolved against the ity of any branch of the government to impair, weaken or obrogate those inherent rights, in favor of the people—in favor of local, municipal self-government, because that is one of the interest rights of the people. God proposed and established these or levy a tax upon a municipal corporation of independence, and section 1, article I, of our not corporate officers to create a debt against constitution. Can the government dispose of

QUESTION OF SOVEREIGNTY. There has been much said about the soy ereignty of the nation and of the state. This claim is mestcading, in that it is true only in a qualifed ecose. As between the nation and all foreign governments, the national government is absolutely sovereign, etween the national government and the state governments it is only sovereign while exercising its functions within its delegated powers, and such implied powers as are necessary to effectuate its delegated powers Nebraska is sovereign as between itself and other states in the union, but it is not sovereign as between itself and the people people in the nation and under state gov-ernments are the cely sovereign power in a republican form of government. Webster defines sovereignty to be "The exercise of, or right to exercise, supreme power; dominion sway.' The sovereignty of the national and state governments of this republic, es and for the purposes above indicated, were rendered by the people, but for all purposes sovereignty still remains with then as the source and embodiment of all political and governmental power. 'We the ple, says the preamble to our constitution, grateful to Almighty God for our freedom, do ordain and establish the following declarthe constitution of the State of

Con the creature its creator? eign then the creature once created, could pre vent the creator from ever changing if creature. The people have the inherent right to change their form of government, so long as they do not impair, weaken. abridge or abrogate the inherent rights any of the people. There is a lin which that sovereignty cannot go.

"The right of an elector to vote for those

pality whose people are denied the right to cast that vote is a free municipality, and the end is despotism or revolution, as was the case with our forefathers. "The ballot is the freemen's weapon of de-

ense and protection in this country.
"The constitution of the state guarantees o every elector that right; it would not be epublican in form if it did not do so. ections 1 and 5, article vii, state constitu-

'The framers of the Declaration of Inde sendence had this vital right of the people n mind when they recorded in that document this indictment against King George III: 'He has erected a multitude of new offices, and sent hither awarms of officers to harass

our people and cat out their substance."
"There is a reciprocal duty or obligation between the state and the citizen. The citizen is bound to pay taxes, the emount of which cuts no figure, to support the state, and the state in turn is bound to protect the citizen's life, liberty and property—to proect him in the enjoyment of all his inherent rights, and when this reciprocal duty is abrogated by the citizen the state governient must starve and die; when abrogated by the state the door to lawless anarchy is opened.

TWO SALIENT POINTS. "Taxation and representation go hand in

hand in a republican government like ours. Taxation without the right of representation despotism, pure and simple.
"The state has the undeniable right to "The supreme court of Iowa, in State ex rel Howe against Mayor, etc., City of Des Moines et al, October 9, 1897, at page 639, seq. No. 5, volume 72, N. W. Rep., in a learned opinion by Kinne, C. J. quoting with pronounced approval Hanson against Vernon, 27 Jowa, 73, says: 'It cannot be maintained that the constitution confers upon the

of the written constitution an unwrater constitution which guarantees and well protects all absolute rights of the people. The government can exercise shown the right to local municipal self-government. snown, the right to local municipal self-gov-ernment by the people; the right of the people to have representation; the right to vote for their representative to the people to have representative to the people to the people to have representative to the people to the people to have representative to the people to the people to the people to

and cannot be abridged or abrogated with in the constitution of 1875 which expressly impunity. If the taxes levied upon the people or by any just and fair construction of that impunity. If the taxes levied upon the people by the state are not uniform, then a vital protection to the people of the state is feopardized. An act of the legislature which imposes a non-uniform taxation upon the people of any or all parts of the state is unconstitutional, or else the people have framed a constitution under which the legislature may relieve the people in one part. government is an inherent and inalienable legislature may relieve the people in one part right of the people that lies at the foundadistrict, school district, village, town, city and county administers its own affairs by the people and for the people, citing Barrett nation, and that courts are charged with against Brooks, 21 Iowa, 144, 151. Continuing, Judge Dillon, in section 11, says: 'The civil territorial divisions erected into corrections with defails covers of local and congresses from attempting to directly.

throughout the state, affecting the people of the whole state alike, any more than it has the right to impose non-uniform taxa-tion upon the people. The principle is the same whether the power is exercised by the state in the one case or the other.

"Nor can the state tax a people of a of the taxpavers of such municipality.

CASES DIRECTLY IN POINT. "In Livingston ve. Wider, et al., 50 III., was a case where the legislature of Illinois in 1867 passed an act to cetablish to cetablish police commission for the East St. Louis, providing appointment by the gover the consent of the senate, governor. three commissioners who were to control the police department of the city, and of a failure of the city cil to appropriate money amount required according council the annual estimate of such commission then such commissioners were power to issue certificates of indebtedness in the name of the city which should be receivable in payment of taxes, etc. The court held the act unconstitutional and that While the act creating these commissioners does not, in terms, give the right to impose a direct tax, yet does give them the power to create a debt against the city and the power to create a debt to be discharged by the levy of a tax are substantially the same thing.

"Other authorities are not wanting in support of this principle. "In Wider of al against East St. Louis, ause 55 III., 133, the court says: 'The legislature the ordinarily has no power to impose a debt the corporation, or to levy a tax thereon, cliber directly or indirectly, without the consent of those to be affected thereby, or of the municipal authorities.' The court ex-

pressly adhered to the ruling in the case of "The court, in 55 Ill., suora, holds that 'the octrine in reference to the possible existence of cases in which the legislature may imose a local tax without the consent of the orporate authorities, as in case of the fallare of the police department of a city to rovide reasonable security for life and propuch deficiency, and assess the expense during the recess of the senate. "Section 19 rty, and the state should undertake to supply thereof upon the city—has no application in a case where it is attempted to confer the cower of creating a debt against the city, without its consent, upon police commission—lect of duty, or malfensance in office; and the may declare his office vaccuat of lil the creation of the composition of the cases of the composition of the cases of the composition of the cases of the case of the cases of the case of submitted to nor approved by the people of the city or its corporate authorities."

Councilmen, City of Detroit, 58 Mich., 213 wherein the court says: 'All officers and functionaries exercising powers of governmen; and control over political action, must derive their powers and office, either from the people directly or from the agents or representatives of the people.

"It is well to note that it is a settled principle of constitutional construction re-

SETTLED PRINCIPLE.

specting the rights of the people to local municipal self-government that courts must look to the existing conditions in that re-

and not repugnant to the constitution of the United States and the principles of the Declaration of Independence."

"Judge Cosiey, in his Constitutional Limitations, speaking of the right of local municipal self-government and the constitution of the states respecting that right, says:

"If not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and are framed with its present existence and perpetuates local government through various classes of municipal bodies whose cessential character must be respected, as fixed by usage and recognized. And any legislation, for any authority not delegated to them, become a mental descential requisites of such bodies, has always been regarded as invalid and unconstitutional." It may not be too much local povernment and usage of municipalities respecting their local government through various classes of municipal bodies whose cessential character must be respected, as fixed by usage and recognition when the constitution authority not delegated to them, become a mental and exsential requisites of such bodies, has always been regarded as invalid and unconstitutional." It may not be too much lo say that the custom and usage of municipalities respecting their local government state or national—fails to come up to this standard, they fail to fulfill the people' to protect, not to destroy, or impair these inherent rights. When a government state or national—fails to come up to this standard, they fail to fulfill the people' to protect, not to destroy, or impair these inherent rights. When a government state or national—fails to come up to this standard, they fail to fulfill the people' to protect, not to destroy, or classes of municipal bedies whose cessential character must be respected, as fixed by usage and recognition when the constitution of purpose which disregards any of the fundamental power.

REPUGNANT TO A REPUBLIC. municipalities respecting their local government and political functions cannot be "The right of an elector to vote for those who are to represent him is a right recognized by the Declaration of Independence and is an inherent right which cannot be taken away from him. There can be no republican form of government anywhere as long as he is denied this right or where the free use of that right is abridged. The right of the American freeman to cast his ballot without let or hindrance for thase who represent him in the national, state or municipal governments and have that ballot honestly counted is one of the cardinal, vital principles of this government and a denial of that right is not only a usurpation, but the inevitable forerunner of a despotism. It not only sounds the death knell of a free government, it is the keynote of the requiem over its grave.

"When the constitution of 1875 was adopted (November 1, 1875.) it was and had

when the constitution of 1875 was and had been the universal usage and custom of the people of the municipalities and all other table despotism or revolution, as was the use with our forefathers. from the end of their territorial governmen -May 1, 1867, when the state was admitted into the union by the proclamation of President Johnson under the constitution formed by the people February 9, 1886. If there was an exception to this, the exception proved the rule.

POWER UNRECOGNIZED.

"There was absolutely no constitutional provision in the organic act of 1866 which contravened the right of the people to regulate their own local and domestic affairs as sovereigns in that regard in their municipal governments. The right of the governor to make the appointment of local municipal officers under what is called the police power of the state, or otherwise, was neither provided for nor recognized by the constitution of 1866; and I may say very sparingly, if ever, exercised by the executive. It is quite true that the organic act of May 35, 1854, for the territorial government of the territory of Nebraska and Kansas did pro-vide in section 7 thereof that the governor shall nominate, and by and with the consent of the legislative council, appoint all officers not herein otherwise provided for, but that and the whole of said section 7 of the organic act was entirely left out of the constitution of 1866.

"If it be conceded that the people could by the constitution of 1875 surrender their usages and customs so long exercised over their municipal affairs, it will not be con-tended that such surrender can be maintained by implication. These customs and usages by the people of the municipalities, under the authorities, become vested eromental rights and cannot be divested except by the unmistakable express grant of surrender in such terms as leave no room for doubt or conjecture, otherwise the doubt or conjecture must be resolved in favor of established usages and cu the people of the m y. I have been unable the people municipality. find a single respectable authority contra-vening this proposition. There may be devote for their representative municipal officials as well as state officials.

"There is still another limitation upon the right of the state to tax the people, and that is that the taxes must be uniform.

This principle of government is fundamental and cappot be abridged on abroards with

"Nor is there any constitutional authority What I centend is, that usage and existing at the time the constitution of 1875 was adopted, cannot, if at all, be taken awa Every- other than by an express constitutional grant; also that the right to such local self-government is an inherent right in the people, which, in order to become and remain an "Nor has the state any right to impose a debt or colligation upon a municipality for state purposes unless it is made uniform lasting and unchangeable because it is lasting and unchangeable, because it is inherent, inalienable.

"It should, in this connection, be rememcuring the greatest possible liberty to the people; the people are not made for these municipality; nor can the legislature pro-vide by a constitutional enactment in any case for such taxation without the consent tection of their inalierable rights, 'governments are instituted among the people.' The people have other inalienable rights than the right to life, liberty and the pursuit happiness. The people are 'endowed their creator with certain loadlenable rights among which are life, liberty and the pur-suit of happiness,' says the Declaration of Independence, and one of those rights 'among which,' is the right of local municipal selfgovernment. The provisions of the consti-tution of 1875 and the only provisions that any claim is or can be made for the act the legislature authorizing, and the only ones permitting or empowering the governor to make the appointments of the so-called present members of the Fire and Police Com-mission of this city, and the only ones giving the so-called Fire and Police Commissioners the right to hold said offices or exercise the functions thereof, are sections 10, 11 and 12, of article v of the constitution of 1875. There are none other.

IN NEBRASKA'S CONSTITUTION. "Said section 10 provides: 'The governor shall nominate, and by and with the advice and consent of the senate (expressed by a majority of all the senators elected, voting by yeas and nays), appoint all officers whose offices are established by this constitution or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such offier shall be appointed or elected by the legis-

"Section 11 provides: 'In case of a vacancy during the recess of the senate, in any office which is not elective, the governor shall make a temporary appointment the next meeting of the senate, who shall nominate some person to fill such office, and any person so nominated, who is confirmed by the sense (a majority of all the senators elected, concurring by voting year and nays), shall hold his office during the remainder of the term, and until his successor shall be appointed and qualified. No person, after being rejected by the senate, can be appointed for the same office at the same session unless at request of the

same as herein provided in other cases of

"In line with these exinciples the court, in the New York, supra, says: "The right to choose officers is primarily and inherently in the people." If it is an inherent right in or apply only a property of the exercise of whose vacancy."
"It must be apparent to every lawyer, that in the people. If it is an inherent right in the people, by what right or authority can the legislature take it away in whole or in part?

"Also, Attorney General against Board of Councilmen, City of Detroit 58 Mich, 213. vinced they are, local municipal officers with incidental and only incidental duties to perform for the public generally—for the state—if otherwise, the act of the legislature, ecoefering authority upon the governor to make the appointment is constitutional, the appointments could legally be made by the governor without the "advice and conset of governor without the 'advice and consent of

the senate."
"An officer whose general duties are to the state, but who has incidental duties to per-form for mericipalities or other political subdivisions of the state is a state officer, "In Draper's Civil Policy of America we are told that the early settlers of this country first formed villages for the befter protection of their liberties; then towns, then the settlers of the settlers of